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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
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	)	
Amendment of Rules and Policies Governing Pole Attachments	)	CS Docket No. 97-98
	)	

To: The Commission

AMERICAN ELECTRIC POWER SERVICE CORPORATION
COMMONWEALTH EDISON COMPANY
DUKE POWER COMPANY
FLORIDA POWER AND LIGHT COMPANY
NORTHERN STATES POWER COMPANY

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August 11, 1997

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EXECUTIVE SUMMARY

The Telecommunications Act of 1996 ("the 1996 Act") embodies the notion that a deregulated, competitive telecommunications market results in efficiency and innovation and produces the greatest benefits for the American public. The Electric Utilities urge the Commission to adopt an approach to pole and conduit attachment rate making that is consistent with the competitive market principles underlying the 1996 Act. Where regulation is needed, that regulation should be minimal and designed to achieve a specific goal.

First and foremost, in this rulemaking proceeding, the Commission must incorporate the principles of the 1996 Act through the adoption of competitively neutral pole and conduit attachment rate formulas. As argued by several parties in this proceeding, in order to conform with Congress' intent, freely negotiated agreements should serve as the guiding principal for any attachment rate regulations or formulas adopted by the Commission. Not only is this approach consistent with the 1996 Act, but the changes that have occurred in the pole attachment marketplace over the last twenty years compel such an approach to pole attachment rate regulation.

As the Electric Utilities argued in their Comments, the cable and telecommunications market has grown and the participants offering cable and telecommunications services have diversified. Equally significant, cable television is no longer in its infancy and, as such, there is no longer economically relevant disparity in bargaining power between electric utilities and cable companies. As noted by several commentors, the need for governmental rate regulation must be supplanted in favor of market-driven rate regulation. Therefore, the Commission should be seeking to reduce the degree to which it regulates pole attachment agreements between such entities.

Second, the Commission must recognize that it has limited statutory authority to regulate the siting of cable and telecommunications equipment on electric utility property. For instance, while the Commission has authority to regulate wireline attachments to electric utility poles, contrary to the comments of some parties, the Commission does not have authority to regulate agreements involving wireless equipment. Similarly, the Commission has no authority to grant the request of certain commentors that transmission towers be covered by § 224.

Regulatory forebearance is also warranted in circumstances where the Commission may have jurisdiction to regulate the rates charged by a utility for attachments to its poles, but where it is evident that the parties agreed to the rate in the course of arms-length negotiations. Such regulatory restraint on the part of the Commission has been dictated by Congress and is consistent with 1996 Act's deregulatory spirit. The U.S. Court of Appeals for the Eighth Circuit, in the Iowa Utilities Board decision, recently affirmed the pro-competition, deregulatory principals of the 1996 Act and held that the Commission must be careful not to adopt regulations that impede the free negotiation provisions embodied in the 1996 Act. Therefore, as suggested by several parties to this proceeding, the Commission must adopt pole attachment rate regulations that are in line with Congress' intent and in accordance with the Eighth Circuit's ruling.

Finally, the Commission must make modifications to the existing pole and proposed conduit attachment rate formulas that will ensure accuracy in rate calculations. Despite arguments that such changes are not warranted, the Electric Utilities have provided adequate support to cause the Commission to modify its current pole attachment rate formula to: 1) increase the average height of an electric utility pole; 2) increase the attachment point on the

pole that will allow attaching entities and the pole owner to comply with NESC and other engineering requirements for mid-span ground clearance; 3) to reflect the reality that electric utilities would not allocate a 40-inch safety zone on their poles, which space could otherwise be used for electric conductors, absent the presence of communications facilities; and 4) to treat 30-foot poles owned or used by electric utilities different from those used solely for communications and cable services.

The Commission must also adopt a conduit system rate formula that takes into account the distinctions between telephone and electric utility conduit. At a minimum, the Commission must support the electric utilities in their argument that electric conductors and telecommunications or cable facilities cannot share space in a duct or conduit. As a result, a whole-duct methodology must be used in the conduit rate formula for attachments to electric utility conduit systems. The above changes are necessary to conform the FCC's rate formulas to reflect the true nature of the electric utility property that is, and will be, used by current and future attaching entities.

While Congress did give the Commission authority to regulate pole attachment agreements, it must do so in a manner that is consistent with the 1996 Act's amendments to the Pole Attachments Act, the goals and policies underlying the 1996 Act, subsequent court decisions interpreting the 1996 Act, other Commission rulemakings pursuant to the 1996 Act and the dramatic change in the market for pole and conduit access. The Commission's adoption of the proposals put forth by the Electric Utilities in the Comments and Reply Comments will ensure consistency with each of these guiding factors.

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REPLY COMMENTS

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Florida Power and Light Company and Northern States Power Company (collectively referred to as the "Electric Utilities"), through their undersigned counsel and pursuant to § 1.415 of the rules and regulations of the Federal Communications Commission (the "Commission" or "FCC"), hereby submit these reply comments regarding the calculation of rates to be charged for attachments to their distribution poles, ducts and conduit. The Electric Utilities participated in the initial stage of this proceeding by filing Comments in response to the above-captioned Notice of Proposed Rulemaking.[1/]

1/ Notice of Proposed Rulemaking, In the Matter of Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98 (released Mar. 14, 1997) ("NPRM").

The Electric Utilities would like initially to clarify that the Whitepaper[2/] submitted previously to the Commission was a high-level discussion paper intended to facilitate the exchange of ideas among parties interested in matters related to pole and conduit attachments. In addition, the Whitepaper represents an amalgamation of ideas for regulating pole attachments pre- and post-2001. As a result, some of the proposals set forth in the Whitepaper may be applicable in pre-2001 rate making and some may only be applicable in post-2001 rate making. It was never intended that the Whitepaper would serve as the final document from which pole attachment rules would be promulgated by the Commission. Instead, it was intended to bring certain matters before the Commission as issues that should be considered in the future pole attachment rate rulemaking proceedings to be initiated by the Commission. To the extent that proposals presented in the Whitepaper were applicable to the current proceeding, the Electric Utilities have updated the proposals and have provided support for these proposals in their Comments and Reply Comments in this rulemaking.

I. The Commission Should Reject The Effort By Some Commenters To Expand The Scope Of This Rulemaking To Include Rate Methodologies For Transmission Towers, Rights-Of-Way And Buried Cable

Some commenters argued that the Commission should expand this rulemaking to include the adoption of formulas for transmission towers,[3/] rights-of-way,[4/] trenches and

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2/ Just and Reasonable Rates and Charges for Pole Attachments: The Utility Perspective, A Position Paper Presented By: American Electric Power Service Corp., et. al. (filed Aug. 28, 1996)(the "Whitepaper").

3/ See, e.g., Comments of MCI Telecommunications Corporation at 21; Comments of the Association for Local Telecommunications Services at 4.

4/ Comments of WorldCom, Inc. at 3 n.6.

buried cable.[5/] Other commenters argued that the Commission should simply apply the pole attachment rate formula in its current form to transmission towers and buried cable.[6/] Because the Commission does not have jurisdiction to regulate an electric utility's transmission towers and buried cable, any attempt to expand this rulemaking proceeding to include regulation of the rates charged for access to these facilities must be rejected.[7/] Even if the Commission had the jurisdiction to regulate the rates charged for electric utility transmission towers and buried cable, the Commission did not give notice of its intention to adopt formulas for transmission towers, rights-of-way and buried cable and, therefore, any attempt to expand this proceeding to include such utility property must be rejected.

A. The Commission Does Not Have Jurisdiction To Regulate Transmission Towers

Transmission towers simply are not part of the distribution infrastructure covered by the Pole Attachments Act. Transmission towers are used for delivering large amounts of power at high voltages over long distances. A transmission tower is designed and built to carry conductors that are energized at extremely high voltages between 69,000 and 765,000

5/ Comments of MCI Telecommunications Corporation at 23.

6/ Comments of the Association for Local Telecommunications Services at 4; see also Comments of MCI Telecommunications Corporation at 22 (stating that the Commission should apply the pole attachment rate formula to transmission towers until the Commission establishes a formula for transmission towers).

7/ This issue is being considered currently by the Commission in its Local Competition proceeding. See First Report and Order, In the Matter of Implementation of the Local Competition Provision in the Telecommunications Act of 1996, 11 FCC Rcd 15,499, CC Docket No. 96-98, released Aug. 8, 1996, 61 Fed. Reg. 45,476 (1996)(the "Local Competition Order"); American Electric Power Service Corp., et al., Petition for Reconsideration and/or Clarification of the Local Competition Order (filed Sept. 30, 1996).

volts. Transmission towers are connected to distribution facilities at substations that reduce the voltage from transmission to distribution level. The distribution facilities are the poles, ducts, conduits and rights-of-way used to deliver lower voltage electricity throughout a community. Distribution poles are designed and built to carry conductors that are energized from 110 volts phase to ground to approximately 38,000 volts phase to phase. Because transmission facilities carry much larger amounts of power, they are much more critical to an electric utility's ability to provide reliable electric service. As a result, transmission towers have been designed for a higher level of reliability than distribution poles. In order to enhance the reliability of transmission towers, electric utilities historically have not permitted attachments for joint use purposes on such structures. Electric utilities have not even permitted the attachment of their own electric distribution facilities to their transmission towers. Consequently, transmission towers, unlike distribution poles, have no dedicated "communications" space.

In the Local Competition Order, the Commission purported to "interpret" the language of § 224(f)(1) to include "transmission towers" within the coverage of the Pole Attachments Act.[8/] However, the Commission's interpretation contradicts the plain language of the statute.[9/]

[8/] "Section 224(f)(1) mandates access to 'any pole, duct, conduit, or right-of-way,' owned or controlled by the utility.... We believe the breadth of the language contained in section 224(f)(1) precludes us from making a blanket determination that Congress did not intend to include transmission towers." Local Competition Order, ¶ 1184.

[9/] A court must defer to an administrative agency's interpretation only if it is consistent with the plain meaning of a statute. Iowa Utilities Board v. FCC, No. 96-3321, slip op., at 99 (8th Cir. July 18, 1997).

As discussed in detail in the Electric Utilities' Comments,[10] in 1978, Congress enacted the Pole Attachments Act to provide the then nascent cable television industry with access to the distribution poles of utilities in an effort to foster the development of the cable television industry.[11] Congress passed this law in response to assertions by cable providers that they required the ability to attach their facilities to utility poles in order to wire customer homes.[12] While it did grant cable providers access to utility infrastructure, Congress limited the scope of such access to the components that comprise a utility's distribution infrastructure. Specifically, the 1978 legislation reflected this intent through the statutory language that provides a cable provider with access to "poles, ducts, conduits, and rights-of-way."[13] The 1996 Act amendments to the Pole Attachments Act used this same statutory language in adopting new subsection (f)(1).[14] These items constitute the distribution, but not the transmission, infrastructure of utility companies.

10/ See Comments of AEP et al. ¶¶ 11-17.

11/ H.R. Rep. 1630, 94th Cong., 2d Sess. 4-6 (1976); S. Rep. No. 580 at 12-14, 1978 U.S.C.C.A.N. at 120-22; see also H.R. Rep. No. 204, 104th Cong., 1st Sess. Part I at 91 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 58.

12/ S. Rep. No. 580 at 13, 1978 U.S.C.C.A.N. at 121.

13/ 47 U.S.C. § 224(a)(1).

14/ Congress adopted this language verbatim in § 224(f)(1) of the 1996 Act:

> A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.
>
> 47 U.S.C. § 224(f)(1) (emphasis added).

Nowhere does the 1996 Act mention transmission towers, which are separate and distinct from distribution systems. Under the legal doctrine of expressio unius est exclusio alterius — the expression of one thing excludes the other — it is impermissible to imply a term to a list of items where that term is not expressly included.[15/] Congress has never included the term "transmission towers" within the scope of the Pole Attachments Act. The 1978 legislation was focussed on making the distribution facilities of utilities available to cable television companies, and was limited thereto. If Congress meant to add transmission towers in its new version of the legislation in the 1996 Act, it could have done so. Because it did not, the Commission itself can not add this term to the statute.

During the past two decades of pole attachments regulation, the FCC, cable operators and utilities uniformly have understood that the term "poles" does not include transmission towers. Indeed, prior to the 1996 Act, no party had ever claimed before the FCC a right of access to such facilities under the Pole Attachments Act. Consistent with this interpretation of the Pole Attachments Act, in its Reconsideration Memorandum Opinion and Order revising the 1978 pole rate formula, the Commission stated that "[t]he cable television industry leases space on existing distribution poles owned by electric utilities and telephone

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15/ 2A Sutherland Stat. Const. § 47.23-25 (5th ed. 1992). This doctrine is captured by the admonition in the Supreme Court's decision in West Virginia Univ. Hosps. v. Casey, 499 U.S. 83 (1991), in which the Court stated: "[The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." Id. at 101 (quoting Iselin v. United States, 270 U.S. 245, 250-51 (1926)).

companies to attach its coaxial cable and related equipment."[16] Additionally, at least two other decisions addressing FCC rate calculations, the Commission states that "towers and extremely tall poles" are plant not normally used for attachments.[17] These references are clear examples of the Commission's acknowledgement that, as the plain language of the statute suggests, the Pole Attachments Act does not apply to transmission towers and other transmission facilities. Equally important, this interpretation is consistent with the prevailing understanding within the electric utility industry that the term "poles" means distribution poles only.

Similarly, in a recent order by the New York Public Service Commission (NYPSC),[18] the NYPSC rejected the argument that the pole attachment rate formula in New York should also apply to transmission towers. The NYPSC concluded that electric utilities and attaching entities should be allowed to negotiate a rate for access to transmission towers without the NYPSC establishing a regulated rate.[19]

16/ See In the Matter of Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 4 F.C.C.R. 468 (1989) (emphasis added).

17/ See In the Matter of Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co., 56 Rad. Reg. 2d (P&F) 393, 399 n.10 (1984); In the Matter of Logan Cablevision, Inc. v. Chesapeake and Potomac Tel. Co. of West Virginia, 1984 FCC Lexis 2400 (1984).

18/ In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095, Op. 97-10 (June 17, 1997).

19/ Id.

B. The Commission Does Not Have Jurisdiction To Regulate Buried Cable

MCI argued that the Commission must ensure that there is a rate methodology that is appropriate for "each type of utility structure,"[20/] including buried cable and trenches. Because MCI blatantly ignores the jurisdictional limitations of the FCC's authority under the Pole Attachments Act, the Commission must reject any proposal that it develop a rate formula for buried cable.

MCI makes the bald assertion that Congress included buried cable in the Pole Attachment Act, but fails to provide any support for its claim. This lack of support is explained by the fact that Congress rejected the very idea that the Pole Attachments Act extends the Commission's jurisdiction to buried cable, reasoning that "there are no leasing agreements associated with the use of trenches."[21/]

If Congress intended that the definition of a "pole attachment" should include buried cable, then Congress would not have exempted cooperative utilities from the obligations of the Pole Attachments Act. In discussing the exemption of cooperative utilities from § 224, Congress reasoned that because the majority of a cooperative utility's plant is buried underground — mostly in trenches — there was no need to extend the Commission's jurisdiction to include such entities.[22/] Congress explicitly recognized that "CATV pole attachment arrangements are unnecessary [for buried cable] since there are no leasing

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20/ Comments of MCI Telecommunications Corporation at 23.

21/ S. Rep. No. 580, 95th Cong., 2d Sess. at 18, reprinted in 1978 U.S.C.C.A.N. 109.

22/ Id.

agreements associated with the use of trenches."[23] Therefore, any suggestion that the term "pole attachment" includes buried cable is fundamentally at odds with Congress' rationale for excluding cooperative utilities from § 224.[24]

Furthermore, the arguments presented previously regarding the Commission's jurisdiction over transmission towers also apply to buried cable.[25] If Congress had intended to include buried cable in the Pole Attachments Act, it would have added buried cable to the list of poles, ducts, conduit and rights-of-way.

C. Even If The Commission Has Jurisdiction To Regulate Transmission Towers And Buried Cable, The Commission Did Not Notice Rate Methodologies For These Types Of Utility Property And, Therefore, Cannot Now Address Them In This Rulemaking

Assuming arguendo that the Commission has jurisdiction to regulate transmission towers and buried cable, the Commission did not provide notice of its intention to address rate methodologies for these facilities in this rulemaking, nor did the FCC give notice that it intended to address rates for rights-of-way or trenches. Accordingly, the Administrative Procedures Act ("APA") precludes the Commission from considering these issues in this rulemaking at this time.[26]

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[23] Id.

[24] Practically speaking, MCI's proposal also does not make sense. Buried cable is essentially electric conductors placed directly in a trench, instead of on a pole or in a conduit system. There is nothing on a buried cable to which a cable or telecommunications facility can attach.

[25] See supra discussion at Section I.A.

[26] Section 4 of the APA, 5 U.S.C. § 553(c) specifically provides:

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule

The U.S. Court of Appeals for the D.C. Circuit has recognized that "an agency proposing informal rule making has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible."[27/] This "notice" of proposed rulemaking must be adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process.[28/] The D.C. Circuit has repeatedly held that interested parties are not required to monitor the comments filed by all others in order to receive notice of an agency's proposal. As such, the comments received do not cure the inadequacy of the notice given.[29/]

In its NPRM, the Commission specifically announced its intention to adopt, for the first time, a "conduit methodology that will determine the maximum just and reasonable rates utilities may charge cable systems and telecommunications carriers for their use of conduit

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> making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rule adopted a concise general statement of their basis and purpose.

27/ Home Box Office v. Federal Communications Comm'n, 567 F.2d 9, 36 (D.C. Cir. 1977).

28/ Florida Power & Light Co. v. United States, 846 F.2d 765, 777 (D.C. Cir. 1988). "This requirement serves both (1)'to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies'; and (2) to assure that the 'agency will have before it the facts and information relevant to a particular administrative problem.'" MCI Telecommunications Corp. v. Federal Communications Commission, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (citing National Ass'n of Home Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982)).

29/ MCI Telecommunications Corp., 57 F.3d at 1142; Horsehead Resource Development Co. v. Browner, 16 F.3d 1246, 1268 (D.C. Cir. 1994); American Fed'n of Labor v. Donovan, 757 F.2d 330, 340 (D.C. Cir. 1985).

systems."[30] In this regard, the Commission specifically identified, and sought comment on, the FERC accounts that may apply to conduit occupancy. Significantly, however, the Commission did not likewise propose new formulas for transmission towers, rights-of-way and buried cable. Equally important, the Commission's current approach to rate regulation for poles and conduit is simply not relevant to the costs associated with transmission towers, rights-of-way, trenches and buried cable. As such, the Commission would have to consider an entirely different approach to rate regulation of transmission towers, rights-of-way and buried cable. Thus, the Commission cannot address these issues in this proceeding.

II. The Commission Should Be Regulating Pole Attachments Judiciously

A. The Record Supports The Concept That Regulated Rates Should More Closely Approximate Negotiated Rates

Many commenters endorsed the notion that the Commission should favor voluntary negotiation of pole attachment rates whenever possible.[31] The U.S. Court of Appeals for the Eighth Circuit recently held in the interconnection context that the 1996 Act was designed to promote binding negotiated agreements.[32] The Electric Utilities agree that negotiated pole attachment agreements are most consistent with the pro-competitive, deregulatory goals of the 1996 Act, as well as the specific amendments to the Pole Attachments Act. Indeed,

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30/ NPRM ¶ 1.

31/ See e.g., Comments of BellSouth Corporation at 3-4; Comments of the Edison Electric Institute and UTC, The Telecommunications Association at 7; Comments of GTE Service Corporation at 1; Comments of the United States Telephone Association at 2-4; Comments of U.S. WEST, Inc. at 7-8; Comments of the Electric Utilities Coalition passim.

32/ Iowa Utilities Board, at 115.

post-2001, agreements between utilities and telecommunications carriers should largely be the result of negotiation, not regulation. However, given the statutory prescription of § 224(d)(1), the Electric Utilities believe that, in this proceeding, the Commission should adopt a rate methodology that brings the regulated rate more in a line with a market-negotiated rate. Accordingly, the Electric Utilities urge the Commission to establish a rate methodology under § 224(d)(1) that considers a utility's actual forward-looking economic costs.[33/]

B. The Commission Should Not Review Rates Freely Negotiated By The Parties

The Electric Utilities agree with BellSouth that if a pole owner and an attacher are able to reach an agreement on pole attachment rates, the Commission should accede to the attacher's judgment, as evidenced by its execution of the agreement, that the rates being charged are just and reasonable.[34/] General principles of contract law should dictate the circumstances under which the FCC will review freely negotiated agreements. The FCC should assume parties are sophisticated bargainers negotiating in the normal course of business and with an intent to be bound. Once an agreement has been entered into, the FCC should regulate the rates, terms and conditions of an attachment agreement only when presented with a good faith claim of duress, misrepresentation, fraud or unconscionability. There should be a presumption that the agreement was "freely negotiated" and, thus FCC authority to review the agreement should be exercised judiciously.

33/ See Comments of AEP et al. Section III.

34/ See Comments of BellSouth Corporation at 3.

Tele-Communication, Inc. ("TCI") argued that freely negotiated rates cannot occur where one party has control over an "essential facility."[35/] Significantly, however, in its legal analysis, TCI failed to distinguish between telephone utilities and electric utilities for purposes of applying the essential facility doctrine. Courts have consistently rejected essential facilities claims where the company alleged to have an essential facility was not in the same relevant market as the company seeking access to the facility.[36/] Electric utilities generally are not competitors of telecommunications carriers and cable operators. TCI's erroneous application of essential facility analysis to electric utility poles and conduit illustrates the fundamental importance of distinguishing between incumbent local exchange companies ("ILECs") and electric utilities for purposes of cost-of-service rate making.

As the Electric Utilities demonstrated in their Comments,[37/] ILECs and electric utilities occupy fundamentally different positions in the economically relevant market for cost-of-service ratemaking. The Commission has recognized that ILECs have a clear motivation to restrict access in order to enhance their competitive position in the relevant market.[38/] In contrast, electric utilities generally do not and historically have not, competed head-to-head with cable operators and telecommunications carriers and, therefore, have less economic incentive to restrict access. To the extent that some electric utilities are beginning

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35/ See Comments of Tele-Communications, Inc. at 2-9.

36/ See Interface Group, Inc. v. Massachusetts Port. Auth., 816 F.2d 9 (1st Cir. 1987); Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976 (9th Cir. 1988).

37/ Comments of AEP et al. ¶¶ 18-22.

38/ See, e.g., Local Competition Order at ¶ 10.

to participate in the telecommunications markets, they do so as new entrants that generally lack market power.

Assuming arguendo that electric utilities occupy the same relevant market in some circumstances, contrary to TCI's assertions, the essential facilities doctrine does not justify heavy-handed rate regulation of electric utility poles and conduit for two significant reasons: (1) there are alternative means by which cable and telecommunications services can be provided;[39] and (2) other Commission regulations prohibit an electric utility from charging discriminatory rates.[40] Thus, TCI's attempt to justify a high level of intervention by the Commission based on the notion that electric utility poles and conduit are "bottleneck" facilities must fail.

III. The Commission Will Exceed Its Statutory Authority If It Allows Pole Attachment Agreements To Be Subject To Pick and Choose And Most Favored Nation Treatment

WorldCom suggests that pole attachment agreements should be subject to the same pick and choose and most favored nation rules applied to interconnection agreements[41] pursuant to the Commission's Local Competition Order.[42] Under pick and choose, attaching entities would have the ability to review pole attachment agreements involving a

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39/ See Comments of AEP et al. ¶¶ 64-68.

40/ See id. ¶¶ 69-72. If the electric utility has a telecommunications subsidiary or affiliate, § 224(f)(1) and (g) require that the electric utility provide non-discriminatory treatment to all attaching entities.

41/ Comments of WorldCom, Inc. at 6-7.

42/ Local Competition Order, ¶¶ 1309-1323 (interpreting 47 U.S.C. § 252(i)).

given utility and then choose terms and conditions in the previously executed agreements for inclusion in a new attachment agreement with that utility. Most favored nation treatment would allow a party to a previously executed agreement to retroactively update the terms and conditions of the original agreement with more favorable terms and conditions included in pole attachment agreements subsequently entered into by the same utility. WorldCom's proposal must be rejected.

A. The U.S. Court Of Appeals For The 8th Circuit Has Held That Pick And Choose and Most Favored Nation Treatment Thwarts Voluntary Negotiations

In the interconnection context, the Commission adopted its pick and choose and most favored nation rules based on § 252(i) of the 1996 Act. Section 252(i) states that

> A local exchange carrier shall make available any interconnection, service, or network element provided under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.[43/]

The Court of Appeals held that the pick and choose and most favored nation rules adopted by the FCC do not comport with Congress' intent to promote negotiated, binding agreements and vacated these provisions of the Local Competition Order.[44/]

In support of its decision, the Court of Appeals stated that the pick and choose rule "would thwart the negotiation process and preclude the attainment of binding negotiated agreements" in contravention of the 1996 Act's design.[45/] The court recognized that the

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43/ 47 U.S.C. § 252(i).

44/ Iowa Utilities Board at 115.

45/ Id. at 116.

process of negotiation involves a give-and-take process whereby the parties make concessions on some terms in return for securing benefits on others. Pick and choose eliminates this fair exchange by allowing one party to receive a concession without giving any consideration in return.[46/]

Encompassed in the discussion of pick and choose, the Court of Appeals also implied that most favored nation treatment is equally problematic because it eviscerates the binding nature of a previously executed agreement.[47/] This is because one party is given the unilateral ability to subsequently modify an existing agreement with additional or alternative terms.[48/] The court also stated that most favored nation treatment impedes the ability of later parties to enter into agreements that reflect their unique circumstances.[49/] This is because, in the case of interconnection, the ILEC will be hesitant to agree to different terms in subsequent agreements for fear that previously executed agreements will be unilaterally changed to include such different terms. Pick and choose and most favored nation treatment lead to agreements that are all the same, even when the attributes of the parties and the characteristics of the interconnection arrangement differ.

As noted by several parties to this rulemaking, including the Electric Utilities, and as acknowledged by the Court of Appeals, the values of competition, deregulation and negotiation were the overarching themes of the 1996 Act. These themes define Congress'

46/ Id.

47/ Id. (referencing the Local Competition Order, ¶ 1316 that discusses the most favored nation rule).

48/ Id.

49/ Id.

intent regarding § 224, just as they were dispositive in the Court of Appeals' interpretation of § 252. Indeed, Congress intended that pole attachment agreements be negotiated.[50/] Application of the pick and choose and most favored nation rules to pole attachment agreements would have the same detrimental impact on the negotiation process that caused the Court of Appeals to vacate these rules in the interconnection context.

In addition, there are no provisions in § 224 that can be interpreted as allowing attaching entities to unilaterally require a utility to include the terms and conditions from one pole attachment agreement into another, either as part of an initial agreement or subsequent to the execution of an agreement. If, therefore, the Commission were to adopt WorldCom's proposal, these rules would be subject to the same legal challenge and decision on appeal as occurred with the pick and choose and most favored nation rules adopted in the Local Competition Order.

B. The Commission Lacks Statutory Authority To Require Utilities To Routinely File Pole Attachment Agreements With The Commission

WorldCom's proposal assumes that § 224 grants the Commission the authority to require electric utilities to routinely file pole attachment agreements with the Commission.[51/] Unlike in the interconnection context, there is no provision in § 224 that

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50/ See supra discussion in Section II.A.

51/ Id. at 6. The Electric Utilities understand that, in instances where the FCC has jurisdiction to hear pole attachment complaints, the pole attachment agreements that are the subject of the complaint may be filed with the Commission as part of the complaint process. However, WorldCom's suggestion would require that the Commission become a repository for, and reviewer of, all pole attachment agreements, with the exception of those entered into in states that have exercised jurisdiction over pole attachment agreements. This proposal would appear to create an administrative nightmare for the Commission. It would also be unduly

requires a utility to file attachment agreements with a regulating entity.[52/] While § 211(b) of the 1996 Act[53/] could arguably be relied upon to require telephone utilities to file pole attachment agreements with the Commission, electric utilities are not "carriers" for purposes of this provision. Finally, in instances where a state regulates pole attachment agreements, the Commission is precluded under § 224(c)(1) from exercising its jurisdiction to require any utility to routinely file pole attachment agreements with the Commission.[54/]

IV. The Plain Language Of § 224 Precludes ILECs From Being Treated As Attaching Entities

Because of the disparity between market-negotiated rates and the current regulated rate for cable operators and telecommunications carriers, the United States Telephone Association ("USTA") argued that ILECs should be entitled to the benefits of § 224 when they seek to attach to another utility's poles, ducts, conduit or rights-of-way.[55/] USTA advanced this argument even though § 224(a)(5) specifically exempts ILECs from the definition of telecommunications carriers and, therefore, the benefits of § 224. Accordingly, as the Commission recognized in its Local Competition Order, § 224 does not govern the

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burdensome for the utilities to have to track the terms of every pole attachment agreement to which it is a party in order to ensure compliance with the pick and choose or most favored nation rules proposed by WorldCom.

52/ Compare 47 U.S.C. § 252 (e)(1).

53/ 47 U.S.C. § 211(b).

54/ See 47 U.S.C. § 224(c)(1).

55/ Comments of the United States Telephone Association at 11-16.